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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-933

ROBERT A. McAULIFFE,

Petitioner,

v.

ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Neither *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945) nor *Edelman* v. *Jordan*, 415 U.S. 651 (1974), give to state officials the right to expropriate private property without just compensation. In both *Ford* and *Edelman* the state had lawfully acquired title to the funds at issue. The plaintiff in *Ford* had voluntarily paid the disputed tax prior to suing for a refund. The plaintiff in *Edelman* had never had title to the welfare funds involved. This Court recognized that, under such circumstances, *Ford* and *Edelman* were indistinguishable from an ordinary action in debt. The critical distinction between such a case, and the expropriation of private property forbidden by the Fifth and Fourteenth Amendments, is the manner in which the state officials acquire the property involved.

Ford merely reiterated this Court's earlier decision in *Smith* v. *Reeves*, 178 U.S. 436 (1900) that an action for a

tax refund was barred by the Eleventh Amendment. But *Smith* stressed that such an action was

> unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. 178 U.S. at 439.

The state in *Smith* stressed that it had acquired both possession of and title to the funds in a lawful and proper manner when the petitioner paid the disputed tax, that the case did not involve "money wrongfully or illegally in the possession of the Treasurer," and that "possession has been acquired by means which it was lawful to employ." [1] Neither *Smith, Ford* nor *Edelman* purport to overturn the numerous decisions of this Court that the Eleventh Amendment does not bar injunctive relief to return property unlawfully seized by a state official.

In the instant case it is undisputed that the state officials acquired possession of petitioner's property in an unlawful manner, and that they never acquired title to that property. When the defendant in this action first seized petitioner's money he did so, at least in name, as petitioner's agent and conservator. Holding the funds in this capacity the defendant was liable to suit by petitioner, just as any guardian could be required to account for and return the property of

[1] Brief for Defendant in Error, No. 242 October Term, 1899, p. 3, quoting in part *Georgia* v. *Madrazo*, 26 U.S. (1 Pet.) 110, 123 (1828).

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his ward. This was so even though the money was never segregated, as it should have been, in a separate account, but was placed in a general account maintained by the state. The defendant then attempted to transfer ownership of the funds from petitioner to the state by a bookkeeping entry which altered the capacity in which the funds were held. Inasmuch as that entry and purported transfer were concededly unconstitutional, the title to the money involved has at all times remained in the hands of petitioner. Petitioner asks only that the Court direct defendant to convey to him possession of the property which he owns.

Respondents erroneously suggest that petitioner does not claim "that these funds were not used for his benefit." R. Br. 6. Not only is that precisely petitioner's contention, but the record is clear that the sums were not used to meet any particular needs of petitioner, such as the purchase for him of clothes or books. Rather, respondent sought, by means of the admittedly unconstitutional bookkeeping entry, to expropriate the funds to the general account of the state in payment of a "debt" which the district court correctly found was also unconstitutional. Petitioner lost over a year of his life involuntarily confined in Connecticut mental institutions; there is nothing in the record to suggest that he received effective treatment during this period or that his mental condition was improped by that confinement. Such incarceration, under appropriate circumstances, would render the state officials involved liable for actual or punitive damages, *O'Connor* v. *Donaldson*, 45 L. Ed. 2d 396 (1975); it certainly would not support a contention that petitioner be required to reimburse the state for violating his constitutional rights.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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